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JOSEPH F. SPANIOL, JR.
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No. 87-1414

In the Supreme Court of the United States

OCTOBER TERM, 1987

NICHOLAS MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner argues that he was entitled to an entrapment instruction at trial, and that he is entitled to a new trial because the jury was exposed to extra-record material.

1. Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to deal in stolen securities, in violation of 18 U.S.C. 371, and the substantive offense of disposing of stolen securities, in violation of 18 U.S.C. 2315. He was sentenced to concurrent terms of 18 months' imprisonment and a fine of $5,000. The court of appeals affirmed.

The evidence at trial showed that petitioner, a practicing attorney, was owed $110,000 by Jack Sliker. To reduce the debt, Sliker gave petitioner $1,000,000 in stolen bonds. Petitioner delivered the bonds to Morton Swirsky, a government informant, and was promptly arrested. Pet. App. 18a-19a. At trial, petitioner attempted to discredit Swirsky's account of the transaction by presenting the

testimony of Ralph Angel, who stated that Swirsky lied when he represented in a letter that Angel's company had participated in a particular gold deal involving the Republic National Bank (Republic). The government investigated Angel's statement by examining Republic's records. Agents discovered that Angel's company had no account at Republic but had engaged in gold transactions involving the bank; the government, however, did not present any evidence relating to the point at trial. Pet. App. 9a-10a. At the close of trial, petitioner requested an entrapment instruction, arguing that he had been induced to commit the charged offenses by Swirsky. Because petitioner had not admitted all of the elements of the offenses, the district court declined to instruct the jury on entrapment.

After petitioner was convicted, a juror wrote to the district judge, informing him that another juror, Anthony Ferrara, was an employee of Republic. The letter stated that Ferrara became aware of the government's examination of Republic's records during trial, that he concluded that Angel's trial testimony was incorrect, and that he discussed his discovery with several other jurors. See Pet. App. 5a, 10a-11a. After receiving the juror's letter, the district judge held a hearing at which he examined each of the jurors about Ferrara's remarks. The judge discovered that four jurors heard Ferrara's account, but he declined to set aside the verdict because of "the virtual irrelevance of Mr. Angel's testimony to the issue of [petitioner's] guilt or innocence" (*id.* at 13a).

The court of appeals affirmed (Pet. App. 17a-23a). It accepted the district court's factual finding that Ferrara's statement posed "no possibility of prejudice affecting the verdict" (*id.* at 20a). Applying the law of the circuit, the court also held that petitioner had not been entitled to an entrapment instruction at trial. Petitioner had denied

knowledge that the bonds were stolen, which is an element of the offense of receiving stolen property; the court held that "a defendant may not contest an essential element of an offense and still claim the defense of entrapment" (*id.* at 20a-21a).

2. Petitioner contends that the district court erred by refusing to charge the jury on entrapment. We agree. In *Mathews* v. *United States*, No. 86-6109 (Feb. 24, 1988), slip op. 4, this Court held that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." In contrast, the court of appeals held that petitioner's denial of one of the elements of the charged offenses made an entrapment instruction inappropriate. This holding cannot be squared with *Mathews*.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Mathews* v. *United States*, *supra*.[2]

CHARLES FRIED
Solicitor General

APRIL 1988

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[1] Neither court below made any findings on whether there was sufficient evidence of entrapment to justify submitting the issue to the jury. That question is one that the court of appeals should address in the first instance.

[2] Petitioner's other contention (Pet. 24-30)—that he is entitled to a new trial because some jurors were exposed to extra-record material—does not warrant review. After conducting an evidentiary hearing, the district court held that Ferrara's statement could not have had a prejudicial effect on the outcome of the trial. The court of appeals examined the record and found this determination supported by the record. There is no reason for this Court to consider petitioner's challenge to these factual determinations.

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